

1 Michael L. Baum (CA State Bar #119511)
2 mbaum@baumhedlundlaw.com
3 Frances M. Phares (LA State Bar #10388)
4 fphares@baumhedlundlaw.com
5 Ronald L.M. Goldman (CA State Bar #33422)
6 rgoldman@baumhedlundlaw.com
BAUM, HEDLUND, ARISTEI & GOLDMAN, P.C.
12100 Wilshire Boulevard, Suite 950
Los Angeles, California 90025
(310) 207-3233 Tel
(310) 820-7444 Fax

7 Attorneys for Plaintiff

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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 LESLIE GRISHAM, } Case No. 02-7930 SVW (Rcx)
13 Plaintiff, } Judge: Hon. Stephen V. Wilson
14 v. } **PLAINTIFF'S REPLY TO
15 PHILIP MORRIS USA INC., et al. } DEFENDANTS'
16 Defendants. } SUPPLEMENTAL
17 } OPPOSITION TO MOTION TO
18 } STAY
19 Date: July 6, 2009
20 Time: 1:30 p.m.
21 Courtroom: 6**

PLAINTIFF'S REPLY TO DEFENDANTS'
SUPPLEMENTAL OPPOSITION TO MOTION TO STAY

22 **Introduction**

23 Fraud by any other name is still fraud. The DOJ case is about how these
24 defendants fraudulently concealed the health dangers of smoking cigarettes for
decades . Leslie Grisham's case is about how the very same defendants
25 fraudulently concealed periodontal disease as a health danger of smoking. In the
26 DOJ case, Judge Kessler enjoined these defendants from committing more fraud.
27 Yet by continuing to assert that Grisham should have discovered that her
28 periodontal disease was caused by cigarettes in the 1980s — at a time when

1 defendants were misleading the public by hiding or denying or creating
 2 controversy over the dangers of cigarettes — defendants are once again
 3 committing fraud. But this time their fraud is in direct violation of a federal
 4 court judge's bar order and the appellate court's approval of that order. Until
 5 the DOJ ruling is finalized by the United States Supreme Court, the Grisham
 6 case, where the issue of fraud is front and center for deciding the summary
 7 judgment motion on statute of limitations, should be stayed.

8 **Explanation of California's delayed discovery rule**

9 Under California's "delayed discovery" rule, when a plaintiff does not
 10 discover the defendant's wrongdoing at the time of the injury, the limitations
 11 period does not start until the cause of action *accrues*. A cause of action accrues
 12 when the elements of injury, wrongdoing, and resultant damages are completed.
 13 *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397. A defendant's fraud in
 14 concealing a cause of action against him will toll the limitations period, and that
 15 tolling will last as long as a plaintiff's reliance on the misrepresentations is
 16 reasonable. *Grisham v. Philip Morris U.S.A., Inc., et al.*, 40 Cal.4th 623, 637
 17 (2007). Here, defendants' fraud and fraudulent concealment of their
 18 wrongdoing tolled the statute of limitations on Grisham's periodontal claim until
 19 she learned that her injuries were smoking related in April of 2001.
 20

21 **Delayed discovery allegations of Grisham's complaint**

22 Grisham has properly invoked sufficient information for the Court to
 23 determine that the discovery rule has been pled in her Third C/A for false
 24 representation, FAC ¶¶ 60-65; Fourth C/A for fraudulent concealment, FAC ¶¶
 25 66 - 78; and Sec. IV: Allegations and Facts Re: Delayed Discovery of
 26 Addiction-Related Injuries . . . ", FAC ¶¶ 169 - 189. She has pled that she did
 27 not learn until April of 2001 that smoking caused periodontal disease. "[A]

1 plaintiff's ignorance of wrongdoing involving a product's defect will usually
 2 delay accrual [of the cause of action] because *such wrongdoing is essential to*
 3 *that cause of action.*" *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797,
 4 813; *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal. App. 4th 1048).

5 **Reasons to apply the DOJ case and stay the proceedings**

6 Because the *DOJ* decision on defendants' fraud and fraudulent conduct is
 7 so broad reaching, it affects every one of Grisham's remaining claims.
 8 Collateral estoppel or issue preclusion is appropriate for the court to consider
 9 due to the numerous claims of fraud Grisham has made which are identical to
 10 the claims of fraud made in the *DOJ* case

11 Moreover, defendants' summary judgment motion argues affirmative
 12 defenses directly related to whether or not their conduct has been fraudulent.
 13 They argue that Grisham has no evidence to prove the reasonableness of her
 14 lack of discovery of the cause of her periodontal disease and a heightened duty
 15 to inquire as to its cause. But where a defendant has been found to have
 16 committed fraud [*DOJ* case], a plaintiff has no inquiry duty unless and until she
 17 receives "actual notice" of the cause of her injuries. *See, Garamendi v. SDI*
 18 *Vendome S.A.*, 276 F.Supp.2d 1030, 1042 (C.D.Cal.2003) [When intentional
 19 concealment tolls the statute of limitations, pursuant to "fraudulent concealment
 20 doctrine," something closer to actual notice than mere inquiry notice is required
 21 to end the tolling period, under California law.]).

22 **Reasons to apply the Pooshs case and stay the proceedings**

23 Because defendants' summary-judgment motion alleges as an affirmative
 24 defense to Grisham's COPD claims a single-injury rule, citing the Nikki Pooshs
 25 case, Grisham's motion to stay notified this court that the Pooshs case is now
 26 before the California Supreme Court on a certified question. *Nikki Pooshs v.*
 27 *Philip Morris, USA, Inc., et al*, No. S172023, 9th Circuit Case No. 04-16338.

1 The question is whether a single-injury or a two-injury rule should be applied in
2 situations where a plaintiff has suffered two injuries at different times from the
3 same wrongdoing.

4 The defendants cited *Pooshs* in support of their theory that Grisham's
5 COPD claim is time-barred under California's single-injury rule. Because
6 Grisham learned that she had smoking induced periodontal disease in April of
7 2001 and COPD in July of 2001 and filed suit on March 15, 2002, she contends
8 that the court does not need wait to find out whether the California Supreme
9 Court will find that a two-injury rule applies to claims like her two claims.

10 However, the defendants have urged the application of a single-injury rule
11 as an affirmative defense to Grisham's COPD claim. While they have made
12 contradictory assertions that (1) Grisham knew she had COPD on February 27,
13 2001 (which she did not know), (2) Grisham does not have COPD (per their
14 expert witness reports), the court would need to know the answer to the certified
15 question before it could consider this defense.

16 **Conclusion**

17 The defendants' reasons for not staying this case are invalid. Their
18 summary judgment motion assume that this court will believe them when they
19 say they have not been misleading the public, including Leslie Grisham, for the
20 last 50 years. Judge Kessler found otherwise, and her decision enjoins them
21 from committing more fraud. Her findings of fraud should be applied to estop
22 the defendants from endlessly denying their fraudulent conduct and
23 misrepresentation of facts about cigarettes, smoking, health risks, nicotine
24 manipulation, the safety of light cigarettes, addiction and targeting of youth.
25 Alternatively, Grisham requests an opportunity to file a motion to assert
26 collateral estoppel and issue preclusion as related to the claims in her case.

27 ///
28 ///

1 Dated: June 25, 2009

Respectfully Submitted,

2 BAUM, HEDLUND, ARISTEI & GOLDMAN, P.C.

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4 By: /s/Frances M. Phares

5 Frances M. Phares, Esq.

6 Michael L. Baum, Esq.

7 Attorneys for Plaintiff

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STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and am not a party to the within action; my business address is 12100 Wilshire Blvd., Suite 950, Los Angeles, California 90025.

On the date hereinbelow specified, I served the documents described as set forth below on the named defendants in this action as follows:

Date of Service: **June 25, 2009**

Document Served: PLAINTIFF'S REPLY TO DEFENDANTS' SUPPLEMENTAL OPPOSITION TO MOTION TO STAY

Parties Served: SEE ATTACHED SERVICE LIST

(VIA THE COURT'S ECF FILING SYSTEM)

(BY PERSONAL SERVICE)

—

(BY U.S. MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing or correspondence for mailing. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

— **(BY E-MAIL)** I caused said documents to be transmitted via facsimile to the e-mail addresses marked on the attached service list.

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED: June 25, 2009 at Los Angeles, California.

/s/ Sheila Beam
Sheila Beam

1 SERVICE LIST

2 Frank P. Kelly
3 fkelly@shb.com
4 Tammy B. Webb
5 tbwebb@shb.com
6 Ingrid Peterson
7 ipeterson@shb.com
8 Patrick J. Gregory
9 Pgregory@shb.com
10 Dana N. Gwaltney
11 dgwaltney@shb.com
12 SHOOK, HARDY & BACON L.L.P.
13 333 Bush Street, Suite 600
14 San Francisco, California 94104-2828
15 Telephone: (415) 544-1900
16 Facsimile: (415) 391-0281

17 Attorneys for Philip Morris USA, Inc.

18 Erin L. Dickinson
19 eldickinson@jonesday.com
20 Amanda S. Jacobs
21 asjacobs@jonesday.com

22 JONES DAY
23 North Point
24 901 Lakeside Avenue
25 Cleveland, OH 44114
26 Telephone: (216) 586-3939
27 Facsimile: (216) 579-0212

28 Peter N. Larson
29 pnlarson@jonesday.com

30 JONES DAY
31 555 California Street, 26th Floor
32 San Francisco, CA 94104
33 Telephone: (415) 626-3939
34 Facsimile: (415) 875-5700

35 Attorneys for Brown & Williamson Holdings, Inc.
36 (formerly known as Brown & Williamson Tobacco Corp.)